Majlis Peguam v Jeyapalan Mahesan

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R1–17–62 OF 1999
KC VOHRAH J
22 FEBRUARY 2000

Legal Profession *— Professional discipline — Suspension from practice — Dishonesty in connection with practice — Bar Council to take possession of defendant or firm's documents — Application to compel delivery of documents — Delay in certifying that defendant had been guilty of dishonesty — Whether notice to demand delivery of documents issued by Bar Council's representative went beyond council's resolution — Legal Profession Act 1976 s 88 & Schedule para 1*

On 16 July 1998, the Chief Judge (Malaya) suspended the defendant from practice under s 88A(3) of the Legal Profession Act 1976 ('the Act'). On 12 June 1999, the Bar Council certified pursuant to s 88(1) of the Act that there was reasonable cause to believe that the defendant Mr Jeyapalan Mahesan of Messrs Clough Thuraisingham & Jeya Mahesan had been found guilty of dishonesty in connection with his practice and resolved that the powers under s 88 and the Schedule to the Act be exercised in relation to his firm by the appointment of Mr Puravalen as its representative. Following his appointment, Mr Puravalen issued a notice on 29 July 1999 pursuant to para 1 of the Schedule to the defendant requiring that certain documents be handed over to him. The name of the firm referred to in the notice was 'Messrs Jeya Mahesan & Co'. The defendant refused to deliver the documents requested for and hence this application before the court under para 2(b) of the Schedule to the Act. The defendant objected to the application on the grounds: (i) delay in deciding to move against him; and (ii) the resolution made by the Bar Council related to the exercise of powers under the Schedule in respect of the defendant who was named in the certificate of the Bar Council as being Mr Jeya Mahesan of the firm 'Messrs Clough Thuraisingham & Jeya Mahesan' but the notice sent related to the delivery of 'files and accounts of your firm Messrs Jeya Mahesan & Co' and the notice went beyond what was resolved by the Bar Council.

Held, dismissing the application:

(1) The Bar Council should ideally have acted more promptly but the delay of almost a year before certifying that the defendant had been guilty of dishonesty in connection with his practice did not invalidate the action under s 88(1) which set the provisions of the Schedule into motion (see pp 598H–599A).

(2) Clearly the notice sent by Mr Puravalen who acted for the Bar Council went outside the scope of the duty entrusted in him which was to go against the defendant and the firm of 'Clough Thuraisingham & Jeya Mahesan'. In any event, no proof was

afforded that the firm was Messrs Mahesan & Co and that it existed at the time of the suspension. In the circumstances, the court could not make the order requested for (see p 599E–G).

[**Bahasa Malaysia summary**

Pada 16 Julai 1998, Hakim Besar (Malaya) telah menggantungkan defendan daripada amalan undang-undang di bawah s 88A(3) Akta Profesion Undang-Undang 1976 ('Akta tersebut'). Pada 1 Jun 1999, Majlis Peguam mengesahkan bahawa menurut s 88(1) Akta tersebut terdapat sebab munasabah untuk mempercayai bahawa defendan En Jeyapalan Mahesan dari Tetuan Clough Thuraisingham & Jeya Mahesan adalah didapati bersalah kerana ketidakjujuran berkaitan dengan amalannya dan memutuskan bahawa kuasa di bawah s 88 dan Jadual kepada Akta mestilah dilaksanakan berkenaan dengan firmanya melalui perlantikan En Puravalen sebagai wakil Majlis. Berikutan dengan perlantikannya, En Puravalen telah mengeluarkan notis pada 29 Julai 1999 menurut para 1 Jadual tersebut kepada defendan meminta beberapa dokumen-dokumen diserahkan kepadanya. Nama firma yang dirujuk adalah 'Tetuan Jeya Mahesan & Co'. Defendan enggan menyerahkan dokumen-dokumen yang diminta dan disebabkan itu wujud permohonan di hadapan mahkamah di bawah perenggan 2(b) Jadual di dalam Akta tersebut. Defendan membantah permohonan tersebut atas alasan: (i) kelengahan di dalam pembawaan tindakan terhadapnya; dan (ii) resolusi yang dibuat oleh Majlis Peguam berkenaan dengan pelaksanaan kuasa yang dibuat di bawah Jadual berkenaan defendan yang dinamakan di dalam Sijil Majlis Peguam sebagai En Jeya Mahesan dari firma 'Tetuan Clough Thuraisingngham & Jeya Mahesan' tetapi notis adalah berkaitan dengan serahan 'fail-fail dan akaun-akaun firma kamu Tetuan Jeya Mahesan & Co' dan notis telah melampaui daripada yang diputuskan oleh Majlis Peguam.

Diputuskan, menolak permohonan tersebut:

(1) Majlis Peguam patutlah bertindak dengan lebih cepat tetapi kelengahan hampir setahun sebelum mensahkan bahawa defendan adalah bersalah untuk ketidakjujuran berkaitan dengan amalannya tidak menjadikan tindakan tidak sah di bawah s 88(1) daripada menggerakkan peruntukan-peruntukan Jadual untuk beroperasi (lihat ms 598H–599A).

(2) Dengan jelas notis yang dihantar oleh En Puravalen yang mewakili Majlis Peguam adalah di luar skop yang diamanahkan kepadanya di mana ia sepatutnya dikeluarkan terhadap defendan dan firma 'Clough Thuraisingham & Jeya Mahesan'. Walau apa sekalipun, tiada bukti telah diberikan bahawa firma adalah 'Tetuan Mahesan & Co' dan bahawa ia wujud semasa penggantungan. Di dalam keadaan-keadaan berikut, mahkamah tidak boleh membuat perintah yang dipohon (lihat ms 599E–G).]

A **Notes**

For a case on suspension from practice, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1641.

B **Legislation referred to**

Legal Profession Act 1976 ss 88(1), (2), (3) , 88A(3), (6), Schedule paras 1, 2(b)

N Navaratnam (*Saheran Woon N Navaratnam*) for the plaintiff.
Manjeet Singh Dhillon (*Manjeet Singh Dhillon & Co*) for the defendant.

C *Cur Adv Vult*

KC Vohrah J: Under para 1 of the Schedule to the Legal Profession Act 1976 ('the Act'), the Bar Council may require the production or delivery to an appointed person and the Bar Council may take possession of certain documents in the possession and control of an advocate and solicitor or his
D firm.

The Schedule also provides other procedures to be adopted after the Bar Council has taken possession of such documents as to notices of the particulars of the said documents to be sent to the said advocate and solicitor, for the said advocate and solicitor to apply to a judge in chambers for the return of the documents and for the Bar Council to deal with the
E documents. There are other procedures relating to trust moneys relative to the said advocate and solicitor or his firm.

Under para 2(b) of the Schedule, the High Court or a judge may, on the application of the Bar Council, inter alia, order that person to comply with the requirement made under para 1 and to deliver documents within
F such time as may be specified in the order or to search for and take possession of the documents referred to in para 1.

The application before me is an application against the defendant made pursuant to the said para 2(b). The Bar Council relies on s 88 as the basis for the application under the said para 2(b).

G Subsection (1) of s 88 reads:

> The Bar Council may if it has reasonable cause to believe that an advocate and solicitor, or a clerk or servant of an advocate and solicitor, has been guilty of dishonesty in connection with that advocate and solicitor's practice as an advocate and solicitor or in connection with any trust of which that advocate and solicitor is a trustee, issue a certificate to that effect and thereupon the
H Schedule, except para 7 thereof, shall apply in relation to that advocate and solicitor.

Since the defendant has referred to several subsections of the same section, the relevant subsections of s 88 are reproduced below:

I (1) ...

(2) Where the name of an advocate and solicitor is removed from the Roll or an advocate and solicitor is suspended from practice, he shall, within twenty-one days from the material date, satisfy the Bar

Council that he has made suitable arrangements for making available to his client or to some other advocate and solicitor or advocates and solicitors instructed by his client or by himself — A

(a) all deeds, wills, documents constituting or evidencing title to any property, papers, books of account, records, vouchers and other documents in his or his firm's possession or control, or relating to any trust of which he is the sole trustee or co-trustee with one or more of his partners, clerks or servants; and B

(b) all sums of money due from him or his firm to, or held by him or his firm on behalf of, his clients or subject to any such trust as aforesaid.

(3) If he fails so to satisfy the Bar Council, the said Schedule shall apply in relation to him. C

(4) ...

(5) ...

The relevance of sub-ss (2) and (3) of s 88 can be seen in the context of an order made against the defendant in 1998. On 16 July 1998, the Chief Judge (Malaya), by an order, suspended the defendant from practice under s 88A(3) of the Act. Under sub-s (6) of s 88A, the provisions of sub-ss (2) and (3) of s 88 shall apply mutatis mutandis to the advocate and solicitor relative to the date of the order of suspension of the Chief Judge (Malaya). D

Coming back to the application before me, it seeks an order that the defendant hand over within seven days of the order to Mr Puravelan certain documents in his possession or in the possession of Messrs Jeya Mahesan in connection with, inter alia, cases or conveyancing files handled, or books of accounts and other documents relating to clients and office accounts maintained by Messrs Jeya Mahesan & Co. The relevant terms of the order sought for read as follows: E F

1 The defendant either by himself, or his servant, or his agent or employees, do cause to be delivered to Mr M Puravalen within seven days of the date of the order herein being served on the defendant, all deeds, wills, documents constituting or evidencing title to any property, papers, books of account, records, vouchers and other documents in the defendant's or his firm's possession or control, or relating to any trust of which he is the sole trustee or co-trustee with one or more of his partners, clerks or servants, and all sums of money due from him or his firm to, or held by him or his firm on behalf of, his clients or subject or any such trust as aforesaid including but not limited to the following: G

(i) all files related to any cases conducted by Messrs Jeya Mahesan & Co inclusive of but not limited to files which have been closed (inactive) or which are still open (active); and H

(ii) all conveyancing files conducted by Messrs Jeya Mahesan & Co inclusive of but not limited to the files which have been closed (inactive) or which are still open (active);

(iii) all books of account, records, vouchers, cash books, books of receipt, bank statements, relating to client's accounts and office accounts maintained by Messrs Jeya Mahesan & Co inclusive of but not limited to other books, records and/or documents related to or I

containing any financial information in regards to the practice of the defendant at Messrs Jeya Mahesan & Co;

(iv) all deeds, wills and documents constituting or evidencing title to any property. ...

It will be observed that the purported firm of the defendant in the order sought for is named as 'Messrs Jeya Mahesan & Co'.

It is pertinent to sketch out the nature of the course of action the Bar Council took before making its application to the court.

About one year after the Chief Judge (Malaya) had made the suspension order against the defendant under s 88A(3), the Bar Council on 12 June 1999 certified pursuant to s 88(1) that there was reasonable cause to believe that the defendant 'Mr Jeyapalan Mahesan of Messrs Clough Thuraisingham & Jeya Mahesan' (amongst other persons) had been found guilty of dishonesty in connection with his practice and resolved that the powers under s 88 and the Schedule to the Act be exercised in relation to his firm by the appointment of Mr Puravalen as its representative to exercise all or any of the powers under the relevant provisions of the Act on its behalf.

The Bar Council on the same date resolved, inter alia, that Mr Puravalen be appointed under s 88 of the Act to take control of the files and clients' accounts of Mr Jeya Mahesan and to exercise the powers provided under the Schedule in relation to the said matters.

Following his appointment, Mr Puravalen issued a notice on 29 July 1999 pursuant to para 1 of the Schedule to the defendant requiring that certain documents to be handed over to him. The relevant part of the notice reads (and it will be noted that the name of the firm referred to in the notice is Messrs Jeya Mahesan & Co):

Re: Notice under the Schedule Pursuant to s 88(1) of the Legal Profession Act 1976

1 Take Notice that I, M Puravelan have been appointed by the Bar Council Of Malaysia on the 12 June 1999 in accordance with s 88(3) of the Legal Profession Act 1976 to take control of the files and clients' accounts of your firm, Messrs Jeya MAahesan & Co.

2 Take Further Notice that Certificate dated 12 June 1999 has been issued by the Bar Council pursuant to s 88(1) certifying that there is reasonable cause to believe that you Mr Jeya Mahesan have been guilty of dishonestly in connection with your practice.

3 I, M Puravelan pursuant to para 1 of the said Schedule hereby exercise my powers and require you Mr Jeya Mahesan to deliver to me on the 4 August 1999 at 10.00am at the Bar Council at No 5, Jalan Tun Perak, 50050 Kuala Lumpur the following:

(a) All files pertaining to cases handled by your firm whether closed or active;

(b) All conveyancing files handled by your firm whether closed or active;

(c) All books of accounts: records; vouchers; cash books; receipt books; bank statements; fixed report receipts; clients' accounts; office

accounts; and any other books, records and or documents pertaining to financial information with respect to your practice. A

(d) All deeds, wills, documents constituting or evidencing the title to any property.

4 Take Further Notice that your failure to surrender the above will expose you to sanctions under para 2(a) of the Schedule.

5 Please note that you can exercise your rights pursuant to para 5 of the Schedule. B

...

The defendant, on 4 August 1999, replied to this notice and refused to deliver the documents requested for and thus this application before the High Court under para 2(b) of the Schedule to the Act. C

The defendant has objected to the application. An observation was made that the Bar Council had sat on the suspension order of the Chief Judge (Malaya) for about 12 months before deciding to move against the defendant under s 88(1) and the Schedule. But the thrust of the main objection to the application is this — the resolution made by the Bar Council relates to the exercise of powers under the Schedule in respect of the defendant who was named in the certificate of the Bar Council of 12 June 1999 as being Mr Jeya Mahesan of the firm of 'Messrs Clough Thuraisingham & Jeya Mahesan' but the notice sent relates to the delivery of 'files and accounts of your firm Messrs Jeya Mahesan & Co' and the notice went beyond what was resolved by the Bar Council. Then it is argued, but basically it is the same argument as the main one, that there is inaccuracy in what the Bar Council is seeking for and the defendant has difficulty in responding to the notice. D E

Although the provisions of the Schedule to the Legal Profession Act 1976 could have been applied to the defendant after he had been suspended on 16 July 1998 by the Chief Judge (Malaya) provided certain conditions were fulfilled by virtue of sub-s (6) of s 88A and sub-ss (2) and (3) of s 88, I see no bar in the Bar Council having taken action under s 88(1) which brought into operation the provisions of the Schedule. That the Bar Council did not take action by virtue of sub-s (6) of s 88A and sub-ss (2) and (3) of s 88 does not vitiate any action taken under s 88(1). The Bar Council under s 88(1) acted on the 'dishonesty' of the advocate and solicitor and it is in evidence that the defendant was suspended from practice. It must be observed that whatever the course of action the Bar Council takes, whether by virtue of s 88(1) or by s 88A(6) and sub-ss (2) and (3) of s 88, there is convergence in the use of the provisions of the Schedule (save for para 7 which is excluded by s 88(1)) to proceed with certain procedures relating to certain documents and moneys in the possession of an errant advocate and solicitor and his firm where the advocate and solicitor has resisted compliance with applicable rules. F G H

The Bar Council should ideally have acted more promptly but that it did not, waiting for almost a year before certifying on 12 June 1999 that the defendant, Mr Jeyapalan Mahesan of 'Messrs Clough Thuraisingham & Jeya Mahesan', had been guilty of dishonesty in connection with his I

practice, does not invalidate the action under s 88(1) which set the provisions of the Schedule into motion. Action under the Schedule is certainly a necessity to protect the interests of former clients in respect of their documents and moneys in the control or possession of the defendant or his firm and it is really a case of better late than never if the notice in respect of what is required under para 1 of the Schedule which was sent is valid.

In regard to the notice sent by Mr Puravalen, appointed by the Bar Council, 'to take control of files and clients' accounts of your firm, Messrs Jeya Mahesan & Co', the argument is that it has to be shown that at the material time — the date of the suspension order — that there was a practice known as 'Messrs Jeya Mahesan & Co.' It is pointed out that the resolution of the Bar Council of 12 June1999 referred to the defendant as being of the firm of 'Messrs Clough Thuraisingham & Jeya Mahesen'. The notice, it is argued, is directed at the firm of Messrs Jeya Mahesan which did not exist at the material time, 16 July 1998.

It will be noted that the notice does not request for the files and clients' accounts in the possession of the defendant but 'the files and clients' accounts of your firm Messrs Jeya Mahesan & Co'. The Bar Council certified on 12 June 1999 that action was to be taken against the defendant, 'Mr Jeyapalen Mahesan of Messrs Clough Thuraisingham & Jeya Mahesan' and the notice sent by him in fact make reference to the certificate. Clearly the notice sent by Mr Puravalen who acted for the Bar Council went outside the scope of the duty entrusted in him which was to go against the defendant and the firm of 'Messrs Clough Thuraisingham & Jeya Mahesan'. In any event no proof was afforded that the firm was Messrs Mahesan & Co and that it existed at the time of the suspension. Paragraph 2(b) allows the court to make the order under its terms but the court must first be satisfied that if 'any person having possession or control of any such documents fails to comply further with such requirement', the requirement being what is stated in para 1 (and in the context of the Bar Council's resolution, the notice, sent by Mr Puravalen). The requirement (in the form of the notice) does not comply with what the Bar Council resolved nor has it been shown that Messrs Jeya Mahesan existed at the time of the suspension. I cannot make the order requested for.

As a passing thought, if a charge for a criminal offence is brought under para 2(a) of the Schedule for non-compliance of the requirement it is most unlikely the charge will succeed as the ingredients of the offence cannot be proved on the facts disclosed before me in this case.

I would dismiss the application with costs.

Application dismissed.

Reported by Jafisah Jaafar